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# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-180

ROBERT W. HAGOPIAN
PLAINTIFF-APPELLANT,

*v.*

THE JUSTICES OF THE
SUPREME JUDICIAL COURT
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

## MOTION TO AFFIRM OF THE APPELLEES, THE JUSTICES OF THE SUPREME JUDICIAL COURT

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### Opinion Below

The opinion of the United States District Court for the District of Massachusetts is officially reported at 429 F. Supp. 367 (D. Mass. 1977).

## Jurisdiction

The order of the United States District Court for the District of Massachusetts dismissing the complaint was entered on March 23, 1977. A Notice of Appeal to this Court was filed by the Appellant in the United States District Court for the District of Massachusetts on April 25, 1977. The jurisdiction for the appeal is based on 28 U.S.C. §1253 which authorized direct appeal from a decision of a three-judge district court convened pursuant to the former version of 28 U.S.C. §§2281, 2284.[1] This Motion to Affirm is filed pursuant to United States Supreme Court Rule 16 because it is manifest that the questions on which the decision of the cause depends are so unsubstantial that they do not warrant plenary consideration by this Court.

## Constitutional Provisions and Statutes Involved

### Fourteenth Amendment To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] On August 12, 1976 Congress enacted P.L. 94-381 which repealed 28 U.S.C. §2281 and severely restricted the circumstances requiring the convening of a three-judge court. P.L. 94-381 by its terms does not apply to any action commenced on or before the date of its enactment. Therefore the repealer does not affect this appeal.



### Rules Of The Supreme Judicial Court

The Rules of the Massachusetts Supreme Judicial Court are reproduced as an appendix to the opinion below at 429 F. Supp. 367, 368-370 (D. Mass 1977).

## Question Presented

Whether the establishment by a non-elected State Supreme Court of an annual registration requirement and accompanying fee, a portion of which fee is utilized to fund a Clients' Security Fund, contravenes the First or Fourteenth Amendments to the United States Constitution?

## Statement of the Case

On September 1, 1974, the Supreme Judicial Court for the Commonwealth of Massachusetts promulgated Supreme Judicial Court Rules 4:01-4:08 which, *inter alia,* established a system for registering attorneys and requiring the payment of an annual registration fee which in most cases amounts to $25 per year. The Rules also establish a Clients' Security Fund which is maintained by allocating a portion of the fees collected to the Fund. The Fund is designed to reimburse clients who have incurred losses as a result of defalcations of members of the bar, acting either as attorneys or as fiduciaries. 429 F. Supp. at 368.

Plaintiff, prior to the effective date of the Rules, brought this action in United States District Court for the District of Massachusetts. The District Court on May 24, 1976 denied plaintiff's request to convene a three-judge federal court pursuant to 28 U.S.C. §§2281, 2284 and dismissed the complaint. On appeal, the First Circuit Court of Appeals on December 15, 1976 remanded the matter to the District Court for the convening of a three-judge federal court. A

three-judge court was subsequently convened and on May 23, 1977 that court dismissed plaintiff's complaint. Plaintiff then appealed to this Court pursuant to 28 U.S.C. §1253.

## Argument

THE DECISION OF THE THREE-JUDGE FEDERAL COURT IS CLEARLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED WITHOUT PLENARY CONSIDERATION BY THIS COURT.

### I. The Promulgation of Rules 4:02-4:06, Imposing An Annual Registration Fee On Members Of The Massachusetts Bar, Was Well Within The Power Of The Supreme Judicial Court and Violated No Provision of the United States Constitution.

#### A. *The One Man, One Vote Contention*

Plaintiff-Appellant has brought this action challenging the constitutionality of the Supreme Judicial Court's establishment of an annual registration fee for attorneys, a portion of which is attributable to the Clients' Security Fund. His contention comes in three steps. First he characterizes the act of imposing a fee on lawyers as legislative in nature. Second, he argues that, because the Justices who took this action were appointed, they were not chosen according to the one-man, one-vote principle applicable to legislative bodies. *See, e.g., Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Baker* v. *Carr,* 369 U.S. 186 (1962). He concludes, then, that the product of their legislative action, Rules 4:02-4:06, is unconstitutional. These claims have no foundation in law. The imposition of the fee on lawyers is not a legislative act but rather an incident to the exercise of the Court's judicial functions. The power of the state courts to impose such a fee is firmly established. The one-man, one-vote principle has never been used by the courts against an appointive body but has been applied solely to protect the equal power of individual votes in an elective context. Even in its proper context, the one-man, one-vote principle has never, in and of itself, caused the invalidation of a legislative act but has worked exclusively to recast the boundaries of voting districts. Finally, and fundamentally, a state's distribution of governmental power among its branches is a matter of state prerogative and implicates no federal constitutional question. On every front, therefore, the appellant's claim merits rejection, and the decision of the District Court should be summarily affirmed.



The general question whether a state court can require attorneys to pay a reasonable annual registration fee was treated, and laid to rest, by the United States Supreme Court in *Lathrop* v. *Donohue,* 367 U.S. 820 (1961). In *Lathrop,* the Supreme Court held that the Wisconsin Supreme Court could constitutionally promulgate Rules which integrated the State Bar and require each attorney to pay annual dues of fifteen dollars. The Supreme Court addressed the constitutionality of annual fees as follows:

> We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers. . . . Given the character of the intergrated bar shown on the record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable dues, we are unable to find any impingement upon protected rights of association. *Id.* at 843.

Since *Lathrop* many more state judicial bodies have promulgated disciplinary and enforcement procedures funded by an annual attorneys' registration fee. *See, e.g., Petition of Tennessee Bar Ass'n,* 532 S.W. 2d 224, 229 (1975). *See also Amster, Clients' Security Fund: The New Jersey Story,* 1976 A.B.A.J. 1610 (an article describing the operation of the New Jersey Clients' Security Board, which is funded by an annual $50 fee). Federal courts in more recent decisions have followed *Lathrop* and rejected broad-based constitutional challenges to the authority of state judiciaries to require registration of attorneys and the payment of an annual fee. These decisions have been summarily disposed of by this Court on appeal. *May* v. *Supreme Court of Colorado,* 374 F. Supp. 1210 (D. Colo. 1974) *aff'd* 508 F.2d 136 (10th Cir. 1974) *cert. denied,* 422 U.S. 1008 (1975); *Buschbacher* v. *Supreme Court of Ohio,* C-2-75-743 (S.D. Ohio, October 1, 1976) ***aff'd sub nom.*** *Cuyahoga County Bar Ass'n* v. *Ohio Supreme Court,* 45 U.S.L.W. 3583 (Feb. 28, 1977); See also *Cantor* v. *Supreme Court of Pennsylvania,* 353 F. Supp. 1307 (E.D. Pa. 1973) *aff'd* 487 F.2d 1394 (3d Cir. 1974). Plainly *Lathrop* v. *Donohue* remains the controlling law with respect to registration fees.

Subsequent to the decision in *Lathrop* v. *Donohue, supra,* this Court dismissed an appeal from the Delaware Supreme Court which specifically challenged the constitutionality of judicial establishment of a Clients' Security Fund that was maintained by an annual attorneys' registration fee. *In Re Member of the Bar,* 257 A.2d 382 (Del. 1969), *appeal dismissed sub. nom., In Re Reed,* 396 U.S. 274 (1970). See also *Bennett* v. *Oregon State Bar,* 470 P.2d 945 (Ore. 1970); Annotation to *Bennett*: *Validity and Construction of Statutes or Rules Setting Up Clients' Security Fund,* 53 A.L.R. 3d 1298. The court below, in reliance on the authority of *Hicks* v. *Miranda,* 422 U.S. 332 (1975), held that



this Court's summary disposition of the constitutional claims in *In Re Reed, supra,* warranted dismissal of the complaint. 429 F. Supp. at 368. The summary disposition of the claims raised in *Reed* was thoroughly consistent with the prior pronouncements of this Court in *Lathrop* v. *Donohue, supra.* Therefore, the District Court's reliance on that summary dismissal as dispositive of the issues raised in this case was clearly correct.[2] *Cf. Mandel* v. *Bradley,* 45 U.S.L.W. 4701 (June 16, 1977). The challenged exercise of judicial authority upheld in *Reed* was identical to the action taken by the Supreme Judicial Court in the instant case. The nature of the constitutional claim in the instant case, as in *Reed,* involves a challenge under both the First and Fourteenth Amendments to the United States Constitution. In these circumstances, the District Court recognized that this Court has consistently upheld the authority of a State judiciary to impose a registration fee and, upon the authority of *Reed,* to require that a portion of the fee be allocated to a Client's Security Fund. Thus, the District Court correctly concluded that the disposition in *Reed* foreclosed the constitutional issues which appellant sought to raise, and dismissed the complaint. 429 F.Supp. at 368. In light of the consistent summary treatment which this Court has afforded challenges to the authority of a state judiciary to impose an annual registration fee for attorneys, this appeal clearly does not warrant plenary consideration and should be summarily affirmed. See *Cuyahoga*

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[2] In *Mandel* v. *Bradley, supra,* this Court reaffirmed that summary disposition of an appeal by this Court constitutes a decision on the merits. The Court cautioned against reading a summary affirmance as a renunciation by the Court of doctrines previously announced in its opinions issued after full argument. In the instant case, the Court's summary dismissal in *Reed* was entirely consistent with the doctrines set forth in *Lathrop,* and appellant's alternative request that the matter be remanded to the district court for further consideration gains no support from this Court's opinion in *Mandel* v. *Bradley.*

*County Bar Ass'n* v. *Ohio Supreme Court, supra; May* v. *Supreme Court of Colorado, supra; In Re Reed, supra.*

The appellant further suggests that subsequent decisions of the Supreme Court in the one-man, one-vote area have undercut the validity of the reasoning in *Lathrop* and its progeny. Of course, the summary dismissal of the appeal in *Reed* indicates otherwise. In any event, appellant relies upon the Supreme Court's statement in *Sailors* v. *Board of Education,* 397 U.S. 105 (1967) that "it need not decide . . . whether a state may constitute a local legislative body through the appointive rather than the local elective process." *Id.* at 109-110. The *Sailors Court,* as detailed below, refused to apply the one-man, one-vote standard to an administrative body. While, in passing, the Court cast a glance at the possible constraints on the powers of appointed bodies, it did no more than that. It in no way suggested that an appointed judicial body cannot promulgate Rules with respect to a subject — membership in the bar — over which it has inherent authority under state law. *See Opinion of the Justices,* 279 Mass. 607 (1932).

In constitutional adjudication the one-man, one-vote standard has served exclusively as a benchmark for determining whether specific elections are being conducted in violation of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Chapman* v. *Meier,* 420 U.S. 1 (1975); *Reynolds* v. *Sims, supra.* In *Reynolds* v. *Sims,* for example, the inquiry of the Court focused upon the number of voters in various state legislative districts in Alabama. The *Reynolds* Court found an equal protection violation where malapportionment of the state legislature diluted the right to vote of underrepresented citizens. There is no suggestion in *Reynolds,* however, that legislation enacted by the malapportioned legislature was for that that reason invalid. *Cf. Fortson* v. *Morris,* 385 U.S. 231 (1966); *Sullivan* v. *Alabama State Bar,* 295 F.Supp. 1216 (N.D. Ala. 1969). The



Court in *Reynolds* simply ordered reapportionment to remedy the equal protection violation. *See also Avery* v. *Midland County,* 390 U.S. 474 (1976). Thus, even if this Court took the novel step of applying *Reynolds* to the selection of state high court judges the principle would not, in itself, provide a basis for invalidating the challenged Rules.

In short, one-man, one-vote cases do not address separation of powers issues. And nothing in *Baker* v. *Carr,* 369 U.S. 186 (1961), and its progency suggests that the "one man, one vote" principle has any application to appointive positions or to positions in which the essential functions are judicial rather than governmental or legislative. In *Sailors* v. *Board of Education, supra,* the Court decided that the one-man, one-vote principle did not apply to a local school board which was appointive in nature where the Board performed essentially administrative functions. See also *Dusch* v. *Davis,* 387 U.S. 112 (1967). Further, the *Sailors* Court held that "[a]t least as respects non-legislative officers, a State can appoint local officials or elect them or combine the elective and appointive system." 387 U.S. at 111. The *Sailors* Court then concluded that since the choice of members of the board "did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy." *Id.* Subsequently in *Hadley* v. *Junior College District,* 397 U.S. 50 (1969), the Court held:

> "[A]s a general rule, whenever a state or local government *decides to select persons by popular election to perform governmental functions,* the Equal Protection Clause of the Fourtenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, . . . ." 397 U.S. at 56 (emphasis added).

Thus the decisions culminating in *Hadley* have applied one-man, one-vote principles exclusively to state and local *elections* of legislative officials but do not suggest a constitutional basis for invalidating the judiciary's exercise of its powers.

Finally, several courts have rejected application of the one-man, one-vote principle even where state law provides for election of judges, a context far more analogous to *Reynolds* than this case, on the grounds that the essentially judicial nature of the position renders the principle inapposite. *Wells* v. *Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973); *Holshouser* v. *Scott*, 335 F.Supp. 928 (M.D. N.C. 1971); *New York State Association of Trial Lawyers* v. *Rockefeller*, 267 F.Supp. 928 (S.D.N.Y. 1967). The rationale underlying *Wells* was plainly stated:

> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." 347 F.Supp. at 456.

The Supreme Court's summary affirmance of *Wells* v. *Edwards, supra*, forecloses the argument[3] that one-man, one-vote is relevant to the issue whether appointed judges can take action with respect to conditions of membership in the Bar of the Commonwealth.

B. ***The Remaining Contentions Under the First and Fourteenth Amenaments.***

In addition to his primary challenge based on the one-man, one-vote rationale, appellant has made claims under

[3] A summary disposition on appeal, either by affirmance or dismissal for want of substantial federal question, is a disposition on the merits [illegible] v. *Miranda*, 422 U.S. 332, 344 (1975). *Cf. Mandel* v. *Bradley*, 45 U.S.L.W. 4701 (June 16, 1977).



the First and Fourteenth Amendments. With respect to his First Amendment claim, it is clear that the establishment of the Fund does not deny him rights of association and political expression guaranteed by the First Amendment. The Rules in no way restrict his right to political association with whomever he chooses. Similarly, the Rules do not require him to join an integrated bar association. Furthermore, the Rules in no way dilute his voting rights vis-a-vis other citizens of the Commonwealth nor do the Rules restrict his right to vote in any election for which he is otherwise eligible. Because no denial of the right to vote or of political association is involved in the instant case, appellant has failed to raise a substantial federal claim under the First Amendment. *See Williams* v. *Rhodes*, 393 U.S. 23 (1968).

As to the appellant's claims under the Fourteenth Amendment, he argues that the Rules violate the Equal Protection Clause because attorneys are somehow "fenced out" of the elective process. This is a frivolous assertion, without a conceptual basis. Furthermore, the case of *Hunter* v. *Erickson*, 393 U.S. 385 (1968), which appellant cites as support, has no bearing whatsoever on this case. In *Hunter*, the United States Supreme Court struck down a local ordinance which made passage of municipal legislation designed to end racial, religious, or ancestral housing discrimination more difficult than passage of all other types of municipal legislation. *Id.* at 390. The *Hunter* Court based its decision upon a finding that the challenged procedure was designed to discriminate against racial minorities, thereby implicating a suspect classification and requiring strict scrutiny under the Fourteenth Amendment. *Id.* at 391-392. *See Loving* v. *Virginia*, 388 U.S. 184, 192 (1964). Attorneys, of course, are not a discrete and insular minority requiring the special protection of the Fourteenth

Amendment.[4] *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938); *Bennett* v. *Oregon State Bar, supra.* The Equal Protection Clause presents no barrier to Rules reasonably related to the Supreme Judicial Court's inherent authority to regulate the practice of law.

In sum, none of the appellant's constitutional claims raises a substantial federal question which warrants plenary consideration by this Court. Accordingly, this Court, consistent with its prior treatment of similar cases, should summarily affirm the decision of the court below.

## Conclusion

For the reasons stated above, the Appellees, the Justices of the Supreme Judicial Court, respectfully urge that this Court summarily affirm the decision of the Federal District Court for the District of Massachusetts.

Respectfully submitted,

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[4] In *Hunter* v. *Erickson*, Justice Harlan noted, in a concurring opinion, that putting Negroes to an arduous task such as that involved in amending a state constitution is not, by itself, unconstitutional. For in that situation, unlike the one in *Hunter*, the procedure making a constitutional amendment difficult applies to all, and is therefore neutral on its face. 393 U.S. at 395. In short, it is the racial discrimination, not the difficulty of the task, that spells a denial of equal protection.